DOCUMENT RESUME

ED 330 164 EC 300 13

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TITLE The EHA and Mainstreaming: Has the Idaho Supreme Court Taken a Step Backward?
PUB DATE 90
NOTE 24p.
PUB TYPE Viewpoints (Opinion/Position Papers, Essays, etc.) (120) -- Information Analyses (070)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Court Litigation; Due Process; Educational Legislation; Elementary Secondary Education; Federal Legislation; *Mainstreaming; *Severe Disabilities; Student Placement
IDENTIFIERS Education for All Handicapped Children Act; *Idaho; *Thornock v Boise Independent School District

ABSTRACT

The paper examines an Idaho Supreme Court decision (Thornock versus Boise Independent School District) that placement of a severely handicapped student in a regular classroom with the assistance of an aide was preferable to placement in a segregated special education classroom. The paper argues that this decision is contrary to the provisions of the Education for All Handicapped Children Act, to Congressional intent, and to established case law which has held that the least restrictive environment provision is secondary to the requirement that needed special education services be provided. Case law is reviewed, addressing the least restrictive environment principle, tuition reimbursement, and handicapped parochial school students. It is noted that the United States Supreme Court declined to review this decision on appeal. Extensive footnotes are provided. (DB)

THE EHA AND MAINSTREAMING:

HAS THE IDAHO SUPREME COURT TAKEN A STEP BACKWARD?

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ABSTRACT

The Education for All Handicapped Children Act (EHA) requires school districts to provide a comprehensive program of special education and related services to students who, because of their handicaps, require these services in order to receive an appropriate education. One provision of the law is that handicapped students must be educated in the least restrictive environment possible.

Over the years the courts have held that the least restrictive environment provision is secondary to the requirement that needed special education services must be provided. The Idaho Supreme Court, in a recently published opinion, has held that a regular classroom placement in a parochial school, with the assistance of a one-to-one aide was preferable to a segregated special education classroom for a severely handicapped student. The court awarded the parents reimbursement of the parochial school tuition and the costs of the aide.

In this commentary the author argues that the decision of the Idaho court is contrary to the provisions of the EHA and established case law. In ruling as it did, the author maintains, the Idaho court has actually approved an educational program that will deny the student an equal educational opportunity.

THE EHA AND MAINSTREAMING: HAS THE IDAHO SUPREME COURT TAKEN A STEP BACKWARD?

One of the major provisions of the Education for All Handicapped Children Act (EHA)[1] is that students with handicaps are to be educated in the least restrictive environment. Specifically, the EHA mandates that states are to establish procedures that assure

> that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[2]

The least restrictive environment mandate has often been a critical factor when courts have been called upon to settle disputes between school districts and parents over a proposed special education program. In many of these cases the courts have been required to weigh the benefits of mainstreaming[3] against the benefits of providing greater or more specialized services in a segregated environment.

A recently published decision in which the Supreme Court of Idaho declared that a parochial school was the

least restrictive environment for a severely handicapped student may prove to be one of the most controversial least restrictive environment decisions.[4] The Idaho court, by a slim three to two majority, ordered the school district to reimburse the student's parents for parochial school tuition after it approved that placement over the school district's proposed special education class placement. This decision raises three critical questions: 1) Is a mainstream setting appropriate for a severely handicapped student? 2) Can a private school be less restrictive than a public school? and 3) Is reimbursement (or payment) of parochial school tuition appropriate under the EHA?

LEAST RESTRICTIVE ENVIRONMENT

Since the EHA became effective in 1977 a comprehensive body of case law has developed over the least restrictive environment mandate. Although this requirement appears to be fairly straightforward, it has not been easy to interpret. Questions have arisen concerning the degree to which handicapped students should be mainstreamed and how the least restrictive environment requirement interacts with the EHA provision that handicapped students are to be provided with appropriate special education and related services. The EHA's regulations[5] state that handicapped students are to be educated with nonhandicapped students as much as possible and that removal from the mainstream can occur only to the extent necessary to provide needed special education services. A balance needs to be struck between

providing the appropriate level of special education services and providing the handicapped child with an appropriate amount of mainstreaming. However, the weight of case law indicates that the least restrictive environment requirement is secondary to the provision of appropriate services and may not be used to deny a handicapped student access to needed services.[6]

Several courts have held that the least restrictive environment mandate does not preclude a placement in a segregated setting if such a placement is necessary in order to provide the student with an appropriate education. For example, courts have often approved placements in private day or residential schools attended only by handicapped students when an appropriate program wasn't available in the public schools.[7] Similarly, more restrictive placements have been approved after it has been shown that a satisfactory education cannot be obtained in the less restrictive environment even with supplementary aids and services.[8]

Even when a program in a less restrictive environment has been approved by the courts, it generally has been accomplished only after it has been shown that an appropriate education can be provided in that setting.[9] However, courts have sometimes held that it is appropriate to sacrifice a degree of academic quality in order to provide some mainstreaming.[10] These decisions recognize that mainstreaming has social value that can be just as

important to the handicapped student as academic value. This trade-off, however, should occur only where there are benefits to the student that can be expected from mainstreaming.

Although we normally think of the least restrictive environment as being the setting in which the student will have the greatest amount of contact with nonhandicapped students, this is not always the case. The Eighth Circuit Court of Appeals has held that a public school placement is always less restrictive than a private school placement even if it provides less contact with nonhandicapped students. The court held that the least restrictive environment provision is not satisfied solely by placement in a classroom with nonhandicapped students but can also be satisfied by placement in the same school building.[11] The court indicated that a public school placement was preferred under the EHA as long as it did not conflict with the mainstreaming requirement.

Thus, the courts have clearly established that mainstreaming is not required in every case but must be provided to the maximum extent appropriate.[12] Furthermore, the least restrictive environment mandate does not require that the less restrictive setting is preferable as a matter of law.[13] Mainstreaming should not be provided simply for the sake of mainstreaming alone. Some benefit must be obtained. Mainstreaming should be considered as one of several components of an appropriate

education; however, it is not the most important component, but rather, is clearly secondary to the provision of necessary special education services.[14] One court has even indicated that mainstreaming should not be provided if the mainstream program would not adequately prepare the handicapped students for the mainstream of life.[15]

TUITION REIMBURSEMENT

The U.S. Supreme Court has declared that parents who unilaterally place their handicapped child in a private school are entitled to tuition reimbursement if their chosen placement is later determined to be the appropriate placement. In Burlington School Committee v. Department of Education[16] the Court held that the EHA authorized such reimbursement by empowering the courts to grant appropriate relief in special education disputes. However, the Court stated that parents are not to be reimbursed if the courts ultimately decide that the school district had proposed and had the capacity to implement an appropriate educational program.

Courts since Burlington have held that the parents' chosen placement does not have to be the exact placement finally approved by the courts in order for reimbursement to be awarded. The courts recognize that the parents lack expertise in these matters and may secure a placement that is not identical to the one that finally is determined to be appropriate. As long as their chosen alternative is more appropriate than the one proposed by the school district,

the courts will award reimbursement. However, reimbursement will not be awarded for services that go well beyond what is required.[17]

The parents' chosen school must be on the state's list of approved schools for handicapped children in order for reimbursement to be awarded. The courts have held that reimbursement is not allowed for non-approved schools even if the school district failed to offer an appropriate placement and even if the non-approved facility would provide an appropriate education. The EHA states that a placement must meet state standards in order to be appropriate[18] and the courts have held that non-approved facilities do not meet this requirement.[19]

Approximately one month before the Thornock decision a district court in New York denied reimbursement to parents who had unilaterally placed their child in a private sectarian school that did not provide special education services and was not on the state's list of approved private schools for handicapped children. The court stated that a school district could not place the student in an unapproved school and the court lacked the authority to order such a placement. Since the parents' chosen placement could not be considered to be appropriate, reimbursement was denied.[20]

Reimbursement has also been awarded when the school district had an appropriate placement available but that placement was not called for in a properly executed Individualized Education Program (IEP). The U.S. Supreme

Court has indicated that in order to be appropriate an IEP must be developed according to the procedures called for in the EHA.[21] Serious procedural flaws in the IEP process can be fatal to a school district in a reimbursement dispute;[22] however, imperfections in an IEP will not always render it inappropriate.[23] The deciding factors are often the intent of the school district and the effect the flaws had on the student's EHA rights.[24]

HANDICAPPED PAROCHIAL SCHOOL STUDENTS

Handicapped parochial school students are entitled to receive needed special education and related services under the EHA.[25] However, due to the separation of church and state doctrine certain restrictions apply. There has been little litigation concerning the provision of special education services in the parochial schools; however, the Supreme Court has held that remedial services provided on-site in the parochial schools under Title I of the Elementary and Secondary Education Act (now Chapter I) violated the establishment clause.[26] It is not clear whether this ban on on-site provision of services also applies to special education services under the EHA.[27]

School districts may provide necessary special education and remedial services at a neutral site or at a public school building. If the school district elects to provide the services off-site they may be required to provide the parochial school student with transportation between sites. Regardless of the administrative

arrangements for the provision of services, the public school district is certainly not required to pay the parochial school tuition when the parents elect to enroll their handicapped child in that school.[28]

THE THORNOCK DECISION

The student involved in Thornock v. Boise Independent School District[29] was born with a portion of his brain missing, was multihandicapped, and had an assessed I.Q. of 37. Initially he attended a segregated public school classroom for children with severe or profound handicaps. However, his parents later enrolled him in a parochial school where he was placed in a regular classroom. The parochial school accepted him with the condition that a one-to-one aide was provided. The public school district agreed to provide and pay for certain related services, such as occupational, physical, and speech therapy, but refused to pay for the full time aide. The school district offered a placement in a special education classroom within the public schools but the student's parents claimed that such a placement was inferior to the parochial school and that he was entitled to be mainstreamed under the EHA. The parents consequently initiated administrative proceedings seeking reimbursement for the aide and tuition at the parochial school. After failing to gain relief through the administrative hearings, the parents filed court action. The trial court reversed the final hearing decision and held in favor of the parents.

The trial court's decision was affirmed by a three to two majority of the Idaho Supreme Court. The majority opinion stated that the IEP offered by the school district was defective because it did not set forth goals, objectives, evaluative criteria, and a statement of the extent to which the student could participate in regular education. The majority held that without a valid IEP a free appropriate public education did not exist. The court further found that mainstreaming was an important factor to be considered in assessing an appropriate education and that by accepting federal funds the school district was obligated to accept mainstreaming to the maximum extent appropriate. The court felt that by arguing that its segregated classroom was appropriate the school district ignored the Congressional intent that mainstreaming was preferable to a segregated setting, no matter how appropriate that setting was. The court affirmed the awarding of reimbursement of tuition and the costs of the full time aide stating that when the school district failed to offer an appropriate education the student's parents were justified in making the parochial school placement.

In a strongly worded dissent Chief Justice Shepard disputed the majority's contention that the school district's IEP was defective. The two member minority felt that the IEP contained all the necessary components and that the school district had the resources to implement it. The minority also disagreed with the majority's contention that

mainstreaming was required. The minority felt that mainstreaming was not required by the EHA in cases where the child would receive no educational benefit from it; but rather, the EHA required specialized instruction. Stating that placing the student in question in a regular classroom would essentially be warehousing, the Chief Justice agreed with the school district's determination that full time mainstreaming was not appropriate and that the student's needs could best be met in a special class taught by specially trained teachers with an expertise in educating the mentally handicapped. The minority dissenters concluded that the school district's IEP provided for maximum learning experiences while still providing for some mainstreaming.

COMMENTARY

The decision of the Idaho Supreme Court leaves something to be desired. It ignores much of the case law that has developed over the past 12 years and represents a misinterpretation of Congressional intent in passing the landmark handicapped legislation. The opinion is salvaged only by a thoughtful, well written dissent by the Chief Justice. The prevailing opinion of the majority does a grave injustice to a young handicapped student and is a disservice to the school districts in that state.

The EHA was passed to provide handicapped students with access to specialized instruction and services tailored to meet their unique individual needs. It's intent was to end the exclusion of handicapped children from the public

schools and end the practice of "warehousing" these students in inappropriate regular education programs where they either repeated several grades or were socially promoted. Congress clearly intended to provide handicapped children with an education that would be successful in terms of making them productive, self-sufficient citizens.[30]

The majority in Thornock misinterpreted the least restrictive environment mandate and disregarded the case law concerning that provision of the EHA. The case law indicates that all children do not need to be fully mainstreamed. Although there is a Congressional preference for mainstreaming it is not required in all cases. The U.S. Supreme Court, in a footnote to its Rowley opinion, recognized that Congress did not intend for all handicapped children to be mainstreamed

> Despite this preference for "mainstreaming" handicapped children-educating them with nonhandicapped children-Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that "the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." § 1412(5). The Act thus provides for the education of some handicapped children in separate classes or institutional settings. (Brackets in original. Citations omitted.)[31]

A multihandicapped student with an assessed I.Q. of 37 would benefit from some contact with nonhandicapped children for socialization and modeling purposes. However, a student with an I.Q. in that range cannot benefit from instruction in the regular classroom. At the time this dispute surfaced the student was placed in a third grade classroom in the parochial school yet assessments indicated that he was functioning at a mental age of between two and three years. That student needs specialized instruction in self-care and other skills that will eventually lead to self-sufficiency. The one-to-one aide requested by the parents would not be able to provide this; a trained professional teacher is required for this instruction. Unfortunately, it appears that the court's majority sacrificed the specialized instruction this student needed to meet his unique individual needs for the sake of mainstreaming.

The majority correctly stated that the dispute between the parents and the school district in this case centered on the degree to which mainstreaming was appropriate. The parents opted for a program that stressed mainstreaming at the expense of specialized instruction, whereas the school district proposed a program that stressed educational services and still provided some mainstreaming. In making its decision the court disregarded the expertise of school district officials and the hearing officers. In this respect the court ignored the U.S. Supreme Court's instructions in Rowley that courts were not to substitute

their judgement of appropriate educational practices for that of school authorities.[32] While parents certainly should have a say in how their child is to be educated, it must be recognized that they are laypersons and lack the expertise in educational methodology that school officials have. A handicapped student's right to an appropriate education cannot be dependent on the parents knowledge of educational technique. School districts and the courts must protect that right.

The Thornock court chastised the school district for advocating its proposal by stating that any argument that it was appropriate was "entirely irrelevant and superfluous to any discussion of the real issue in this case."[33] The court further indicated that the school district's perception that a segregated program was academically superior for a handicapped student only expressed a basic disagreement with the mainstreaming philosophy and that by accepting federal funds the school district was required to accept mainstreaming to the maximum extent appropriate. These statements are further indications that the court simply did not understand the issues in the case before it.

The provision of a free appropriate public education for a severely handicapped student was the central issue in this case. The extent of mainstreaming as a component of the total program was not the main issue. Unfortunately, the court did not seem to understand this. The majority got hung up on one subissue and was unable to see the entire

picture. Furthermore, the fact that the school district proposed a segregated program does not in and of itself express a disagreement with the mainstreaming philosophy. It merely indicates a professional judgement that extensive mainstreaming was not appropriate for this specific child. The school district's proposal provided for mainstreaming to what school officials thought was the maximum extent appropriate.

The court's majority also focused on the contention that a proper IEP was not developed, a contention that was disputed by the minority. Without seeing an actual copy of the proposed IEP we cannot pass judgement on whether or not it was properly executed. However, the fact that two justices could not find fault with it indicates that any actual flaws must have been minor. Flaws in an IEP do not make it inappropriate. If the proposed IEP was not letter perfect, the court could have ordered that a new one be written. Again, the court seems to have missed the important issue. The actual educational program to be provided is much more important than the written document.

Under the EHA a school district has the obligation to provide a free appropriate public education to parochial school students but is not obligated to pay their normal tuition. Paying their tuition could be a violation of the establishment clause. In this respect the remedy provided by the court in Thornock is also problematic. The court ordered the school district to reimburse the student's

parents for the parochial school tuition as well as the costs of the aide.

The reimbursement issue centers around the issue of whether or not the program offered by the school district was appropriate. Under Burlington if the school district had offered an appropriate program reimbursement would not be warranted. However, if it was determined that the program offered by the school district was not appropriate reimbursement of some or all of the expenses incurred in the parents' unilateral placement would be warranted. If the court had found in favor of the school district as this commentator feels it should have, the reimbursement issue would not need to be decided. However, since the court found in favor of the parents the reimbursement award is open to discussion.

When the parents prevail in their placement dispute reimbursement for special education and related services and other associated costs only is allowable. Costs of services that go beyond what is required are not allowable. In this case there is no problem with the award of reimbursement for the costs of the aide. However, there is a problem with the tuition reimbursement award. If the parents had requested a placement in a regular classroom in the public schools and the school district had refused, their placement in the parochial school would have been justified since it would have been the only way they could have achieved their goal of full time mainstreaming. However, the record does not

indicate that this was done. In fact, the court's opinion indicates that evidence existed that the parents preferred a parochial school placement and that, regardless of the IEP offered by the school district, they would keep the student in the parochial school.[34] This being the case, reimbursement of the parochial school tuition amounts to subsidization of a religiously-based education. Since the parochial school placement was not required by the student's handicap, a more equitable remedy would have been to have the school district pay the special education costs and have the parents pay the normal parochial school tuition.

The United States Supreme Court declined to review the Idaho high court's decision on appeal.[35] This is unfortunate; in denying certiorari the Court missed an opportunity to correct the injustice that has been done. If the Supreme Court had reviewed the case it could have adopted either the well reascned arguments of the Idaho court's minority or the reasoning of the Fifth Circuit Court of Appeals in another recent least restrictive environment case.[36] The Fifth Circuit case also involved a severely handicappped student with limited cognitive abilities whose parents wanted him placed in a mainstream setting. The appeals court, however, approved the school district's proposed segregated setting stating that mainstreaming was not appropriate for all handicapped students. In the Fifth Circuit case the court gave greater weight to an appropriate educational program than to mainstreaming.

Through the Thornock decision the Idaho Supreme Court has given its stamp of approval to an educational program that will confer little benefit on a severely handicapped child. It has also put school districts in that state on notice that mainstreaming must be provided to all handicapped students even at the expense of educational services that will help them lead productive lives in spite of their handicaps. In so doing the court has inadvertently reinstated a situation Congress sought to eliminate by passing the EHA: the inappropriate placement of severely handicapped children in regular classrooms where they will be destined to failure and frustration. This practice amounts to a denial of an equal educational opportunity since it denies the handicapped student access to services that will help eliminate the vestiges of the handicap. Hopefully, in a future case, the Idaho high court, or a federal court with jurisdiction over that state, will embrace the well reasoned arguments the Chief Justice so eloquently offered in the dissent and correct the injustices that have been done here.

FOOTNOTES

1. 20 U.S.C. § 1401 et seq.
2. 20 U.S.C. § 1412(5)(B). See also 34 C.F.R. §300.550 et seq. for implementing regulations.
3. Mainstreaming is the practice of educating handicapped children in an environment where they have interaction with nonhandicapped children.
4. Thornock v. Boise Independent School District, 767 P.2d 1241, 52 Ed.Law 272 (Idaho 1988).
5. 34 C.F.R. § 300.550 et seq.
6. Osborne, COMPLETE LEGAL GUIDE TO SPECIAL EDUCATION SERVICES 202 (1988).
7. Matthews v. Campbell, 551 EHLR 264 (E.D. Va. 1979); Board of Education of East Windsor v. Diamond, 808 F.2d 987, 36 Ed.Law 1136 (3d Cir. 1986); St. Louis Developmental Disabilities Center v. Mallory, 591 F. Supp. 1416, 20 Ed.Law 133 (W.D. Mo. 1984).
8. Johnston v. Ann Arbor Public Schools, 569 F. Supp. 1502, 13 Ed.Law 680 (E.D. Mich. 1983); Wilson v. Marana Unified School District, 735 F.2d 1178, 18 Ed.Law 197 (9th Cir. 1984); Lachman v. Illinois State Board of Education, 852 F.2d 290, 48 Ed.Law 105 (7th Cir. 1988).
9. Lang v. Braintree, 545 F. Supp. 1221, 6 Ed.Law 349 (D. Mass. 1982); Roncker v. Walter, 700 F.2d 1058, 9 Ed.Law 827 (6th Cir. 1983); Scituate School Committee v. Robert B. 620 F. Supp. 1224, 28 Ed.Law 793 (D.R.I. 1985).
10. Roncker v. Walter, supra n. 9; Bonadonna v. Cooperman,

619 F. Supp. 401, 28 Ed.Law 430 (D.N.J. 1985); Briggs v. Board of Education of Connecticut, 707 F. Supp. 623, 52 Ed.Law 565 (D. Conn. 1988).

11. Mark A. v. Grant Wood Area Education Agency, 795 F.2d 52, 33 Ed.Law 169 (8th Cir. 1986).

12. Roncker v. Walter, supra n. 9.

13. Board of Education v. Diamond, supra n. 7.

14. A.W. v. Northwest R-1 School District, 813 F.2d 158, 38 Ed.Law 95 (8th Cir. 1987).

15. Visco v. School District of Pittsburg, 684 F. Supp. 1310, 47 Ed.Law 142 (W.D. Pa. 1988).

16. 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385, 23 Ed.Law 1189 (1989 (1985). See also Hooker, "Court Upholds Reimbursement for Unilaterally Obtained Private Special Education," 25 Educ.L.Rptr 759 (1985) and Osborne, "Parental Violation of the EHCA's Status Quo Provision Does Not Constitue A Waiver of Tuition Reimbursement," 27 Educ.L.Rptr. 643 (1985).

17. Alamo Heights v. State Board of Education, 790 F.2d 1153, 32 Ed.Law 445 (5th Cir. 1986); Garland Independent School District v. Wilks, 657 F. Supp. 1163, 39 Ed.Law 92 (N.D. Tex. 1987).

18. 20 U.S.C. § 1401(18)(B). See also Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690, 5 Ed.Law 34 (1982).

19. Antkowiak v. Ambach, 838 F.2d 635, 44 Ed.Law 129 (2d

Cir. 1988); Schimmel v. Spillane, 819 F.2d 477, 39 Ed.Law 999 (4th Cir. 1987); Taglianetti v. Cronin, 97 Ill.Dec. 547, 493 N.E.2d 29, 32 Ed.Law 711 (Ill. App. Ct. 1986).

20. Hiller v. Board of Education of the Brunswick Central School District, 687 F. Supp. 735, 47 Ed.Law 951 (N.D.N.Y. 1988).

21. Board of Education v. Rowley, supra n. 18.

22. Muth v. Central Bucks School District, 839 F.2d 113, 44 Ed.Law 1037 (3d Cir. 1988); Board of Education, County of Cabell v. Dienelt, 843 F.2d 813, 46 Ed.Law 64 (4th Cir. 1988).

23. Bales v. Clarke, 523 F. Supp. 1366, 1 Ed.Law 218 (E.D. Va. 1981).

24. Max M. v. Illinois State Board of Education, 629 F.Supp. 1504, 31 Ed.Law 437 (N.D. Ill. 1986); Spielberg v. Henrico County Public Schools, 853 F.2d 256, 48 Ed.Law 352 (4th Cir. 1988).

25. 20 U.S.C. § 1413(a)(4)(A).

26. Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290, 25 Ed.Law 1022 (1985).

27. Osborne, "Providing Special Education Services to Handicapped Parochial School Students," 42 Educ.L.Rptr. 1041 (1988).

28. Mawdsley, "EHA and Parochial Schools: Legal and Policy Considerations," 51 Educ.L.Rptr. 353 (1989).

29. Supra, n. 4.

30. 20 U.S.C. § 1400.

31. 458 U.S. ___, 102 S.Ct. 3038, 73 L.Ed.2d ___, 5 Ed.Law 38, n. 4 (1982).

32. ". . . [C]ourts must be careful to avoid imposing their view of preferable educational methods upon the States." 458 U.S. ___, 102 S.Ct. 3051, 73 L.Ed.2d ___, 5 Ed.Law 51 (1982).

33. 767 P.2d 1249, 52 Ed.Law 280 (1988).

34. 767 P.2d 1246, 1250, 1255, 52 Ed.Law 277, 281, 286 (1988).

35. 109 S. Ct. 2069 (1989).

36. Daniel R.R. v. State Board of Education, 874 F.2d 1036, 53 Ed.Law Rep. 824 (5th Cir. 1989); see also Osborne, "When Has a School District Met Its Obligation to Mainstream Handicapped Students Under the EHA?" 58 Educ.L.Rptr. 445 (1990).